Supreme Court, U.S.
FILED
APR 25 2001
CLERK

(2)

No. 00-1511

In The

Supreme Court of the United States

JOSEPH C. PERNA,

Petitioner,

v.

ARCO MARINE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANTE MATTIONI, ESQUIRE
Counsel of Record
ANDREW H. QUINN, ESQUIRE
MATTIONI, LTD.
399 Market St.-2nd Fl.
Philadelphia, PA 19106
(215) 629-1600
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

COUNTERSTATEMENT OF QUESTIONS

Whether the District Court properly granted defendant's Motion for Summary Judgment since plaintiff Joseph Perna in effect disavowed his complaint and adduced no supporting evidence for his claims?

Whether, even assuming that plaintiff-petitioner had pleaded counts sounding in emotional distress, the Court of Appeals correctly concluded that he had failed to state a cause of action because he did not allege that he suffered physical injury or was in the zone of danger thereof or any extreme Bivens-like conduct on the Captain's part?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, defendant-respondent Arco Marine, Inc. is a wholly owned subsidiary of Atlantic Richfield Company. Atlantic Richfield Company is a publicly held company that owns 100% of the stock of respondent Arco Marine, Inc.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 2

I. THE COURTS BELOW CORRECTLY HELD THAT PERNA'S NEW ALLEGATIONS OF EMOTIONAL INJURY (NOT IN HIS COMPLAINT) FAILED TO QUALIFY AS A COMPENSABLE INJURY UNDER THE *CARLISLE-GOTTSCHALL* TEST 2

II. THE COURTS BELOW CORRECTLY HELD THAT PERNA'S NEW ALLEGATIONS OF PETTY OPPRESSION BY THE CAPTAIN FAILED TO STATE A CLAIM UNDER TRADITIONAL NOTIONS OF UNSEAWORTHINESS .. 7

CONCLUSION 11

APPENDIX

COMPLAINT FILED 06/30/97 .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Boudoin v. Lykes Bros. S.S. Co., Inc., 348 U.S. 336 (1955) 9

Consolidated Rail Corp. v. Gottschall, 512 U.S. 532 (1994) 4

Keen v. Overseas Tankship Corp., 194 F.2d 515 (2nd Cir. 1952) 9

Szymanski v. Columbia Trans. Co., 154 F.3d 591 (6th Cir. 1998) 10

COUNTERSTATEMENT OF THE CASE

Perna filed a Complaint on June 30, 1997, under the Jones Act referring to a personal injury allegedly sustained on April 14, 1995, on defendant's vessel. However, he later testified at his deposition that he had not been hurt.

After the statute of limitations had run, in his Answers to Interrogatories filed February 13, 1998, Petitioner varied from the allegations of his complaint to an earlier period of time that was barred by the statute of limitations; namely, May 1994, when, allegedly, Captain Gray had harassed, embarrassed and humiliated him aboard the ARCO ALASKA and failed to discharge or discipline a member of the Steward's Department who was insubordinate. He charged also for the first time that Captain Gray had humiliated him on a later trip on board the ARCO ALASKA in October 1994, and given him a poor evaluation. This charge was also barred by the statute of limitation. However, Petitioner understandably never moved to amend his Complaint to include these time-barred allegations.

On June 10, 1999, Arco moved for Summary Judgment. Arco noted that Perna had testified that he alone was responsible for the mishap of April 14, 1995, and in any event had not injured himself. As to Perna's other alleged injuries outside the Complaint and Statute of Limitations defendant noted that a claim for emotional distress attributed to work-related stress is not permitted. On November 30, 1999, the District Court granted defendant's Motion and dismissed the Complaint.

On January 3, 2001, the Third Circuit held that the District Court properly concluded that Perna alleged no conduct for which Arco could be liable under the Jones Act or the doctrine of unseaworthiness but had erred in dismissing the maintenance and cure claim on summary judgment and so remanded for further proceedings.

REASONS FOR DENYING THE PETITION

I. THE COURTS BELOW CORRECTLY HELD THAT PERNA'S NEW ALLEGATIONS OF EMOTIONAL INJURY (NOT IN HIS COMPLAINT) FAILED TO QUALIFY AS A COMPENSABLE INJURY UNDER THE *CARLISLE-GOTTSCHALL* TEST.

At the outset, it must be noted that plaintiff's complaint (see Appendix) referred only to injuries plaintiff suffered on April 14, 1995. However, at his deposition on May 4, 1998 (although identifying the specific incident on a ladder that occurred on April 14, 1995 which apparently he had had in mind when filing his Complaint), he stated he had not been injured. In effect, he disavowed his Complaint when he testified:

> Q. What were you doing at the time?
>
> A. We were down in the storerooms . . . The vice-chairman of the union came down to talk to me.
>
> Q. Where did you fall down? What particular location of the ship?
>
> A. We were down in the storage. We were going to go up to my room. And he went up ahead of me. I had to get something. And I

> tried to – you know, I skipped a few steps. I guess I jumped on the second or third and that's all I remember. I was – you know, I wanted to get up. We started talking about the evaluation. I guess I was raving and ranting.
>
> Q. And what did you – you were coming up, taking two steps at a time?
>
> A. Yeah. I hit the first two steps or something like that . . . I fell backwards . . . I guess I didn't get hurt . . .
>
> Q. Were you injured in the fall?
>
> A. No.
>
> Q. Was a report made out? Did you fill out a report?
>
> A. No. no.
>
> Q. Did you get any treatment when you fell backwards either on the ship or otherwise?
>
> A. No. (pp. 232-236)

The facts concerning the time-barred incidents of 1994 that were never pleaded in the Complaint were nonetheless considered by the Courts below. As to these claims for emotional distress, it will be noted that Petitioner began his employment with Arco in 1972. In 1994 and 1995, he held the position of Chief Steward. From May 2, 1994 to June 6, 1994, Perna served as Chief Steward on the ARCO ALASKA. He testified that during the voyage Captain Gray wanted more chicken and pasta in the menu and only wanted meat served two to four times each week in order to limit his budget. Contrary to the Captain's directions, Perna made up his budget to

include meat dishes every night. Perna ignored the order and continued serving beef on a daily basis. Nonetheless, Captain Gray did not alter Perna's budget, and Perna was not disciplined for violating the order.

After completing the May-June 1994, voyage, Perna took about 50 days vacation and then rejoined the ARCO ALASKA on July 21, 1994, under the command of Captain Devins. Perna served under Captain Devins until September 2, 1994, when Captain Gray rejoined the ALASKA and took command. Perna sailed under Captain Gray until October 6, 1994.

Perna continued to sail for Arco, completing two more voyages on the ARCO PRUDHOE BAY, in 1994-1995. Perna sailed under Captain Perkins on the ARCO PRUDHOE BAY until April 14, 1995, when he voluntarily left. He "gave up" because, as he perceived it, the company did not back him when he gave bad evaluations to women and minorities. He has not returned to work since.

Although Perna suggests as a reason for granting his Petition "that the Court of Appeals has misapplied one of this Court's decisions involving an interpretation of the FELA," Petitioner's own description of that case, *Consolidated Rail Corp. v. Gottschall*, 512 U.S. 532 (1994) itself suggests that the present matter does not come within the restrictions laid down in *Gottschall* and particularly the companion case of *Carlisle*, a nervous breakdown case as here, and so was properly dismissed, Petitioner notes:

> In *Gottschall*, the worker was forced to work under hot and humid conditions and when a fellow worker died from a heart attack, the body

was simply covered and left in full view of the others in the work crew for several hours while they continued to work . . .

In the other, *Carlisle*, the worker was forced to work long hours on an erratic basis, and the increased responsibilities attendant upon a promotion carried such stress that eventually he suffered a nervous breakdown.

In *Carlisle*, however, the Court entered judgment for the defendant because . . . "the core of Carlisle's complaint was that he had been given too much – not too dangerous – work to do. That is not our idea of an FELA claim" 512 U.S. at 558.

This Court . . . held that a plaintiff can recover for emotional injury under the FELA only if he/she either "sustained a physical impact" or was "placed in immediate risk of physical harm" by reason of the employee's negligence, 512 U.S. at 547-48. (Petition, pp. 11, 12)

Petitioner continues complaining that:

The "zone of danger" test . . . was applied to this case . . . even though Perna told both the District Court and the Court of Appeals that he was pursuing a claim for intentional infliction of emotional distress. Both courts nevertheless characterized the claim as one for negligent infliction of emotional distress and decided it accordingly.

Other lower courts have also applied the "zone of danger" test to what are clearly intentional acts (citations omitted) . . . A very diligent search has failed to uncover any appellate cases

> which deal with the issue of whether the intentional infliction of emotional distress is compensable under the FELA or the Jones Act. (Petition, pp. 12, 13)

Petitioner has thus failed to show how a Court of Appeals has entered a decision in conflict with the decision of another Court of Appeals or of this Court, as envisioned by Rule 10. Furthermore, Petitioner admits that all the district court cases that have considered the issue have held that a "zone of danger" test applies to intentional acts.

The Court of Appeals noted that Petitioner's Complaint did not in fact include a Count for Intentional Infliction of Emotional Distress. It stated:

> Whether an intentional infliction of emotional distress claim would fare better under the Jones Act has not been addressed by this Court and we need not address it here. Even had Perna's complaint set forth such a claim, however, the facts would not support it. . . . Although it appears that Captain Gray could be difficult to work under, the petty harassment, disagreements, and insults described by Perna do not reach an extreme or outrageous level.

It is noteworthy that Petitioner's Brief does not spell out just where he, in fact, pled a claim for Intentional Infliction of Emotional Distress.

That Petitioner admittedly failed "to develop a factual record which would enable that Court to consider an intentional infliction of emotional distress case" and repents now that "The record before this Court has not

been developed factually to a degree which would facilitate a thorough discussion of an appropriate standard for intentional infliction of emotional distress cases under the FELA and the Jones Act" (Petition pp. 14, 15) is not a reason, let alone a compelling reason, to grant the Petition. If anything, it is a clear reason why the Petition should be denied.

II. THE COURTS BELOW CORRECTLY HELD THAT PERNA'S NEW ALLEGATIONS OF PETTY OPPRESSION BY THE CAPTAIN FAILED TO STATE A CLAIM UNDER TRADITIONAL NOTIONS OF UNSEAWORTHINESS.

The present Petition for Certiorari unfortunately raises questions as to its substantiality. In his Statement of the Case, Petitioner asks this Court to call this non-final case to itself because:

> Captain Gray asked him (Perna) to stop putting beef on the menu for budgetary reasons. The Captain wanted chicken and pasta served to the crew because they were cheaper. Perna refused the Captain's request because he wanted to give the crew as wide a variety as he could, for morale reasons . . . The Captain later remonstrated with Perna for having told the Chief Engineer.
>
> Perna also had some difficulty with an insubordinate subordinate who continued to eat shrimp after he was told he was not allowed to do so (Petition p. 7).
>
> At the conclusion of the (second) tour Captain Gray evaluated Perna's performance . . . "Joe works real hard at this. He is very concerned

> about variety, food preparation and presentation. Food comes out hot and has eye appeal . . . Joe demonstrates high quality cooking skills. Hot and fresh are high on his list of concerns . . . Joe has a strong desire to perform well."
>
> The Captain's criticisms dealt mostly with Perna's supervisory skills . . . "My perception is that at times he (Perna) has little or no control of his department. I have received negative comments from the other three members of his department." (Petition p. 7).

As to Captain Gray, Perna brings up that Gray supposedly failed the U. S. Coast Guard exam for Master the first time he took it and that he was only in the middle grade for an Arco captain (Petition, pp. 8, 9).

The Court of Appeals noted:

> As an absolute liability regime, unseaworthiness indeed encompasses more than the negligence – grounded Jones Act. It does not follow, however, that the unseaworthiness doctrine is limitless in scope . . . The idea that purely emotional injury claims must be bounded in some manner is hardly controversial . . . because Perna failed to allege any physical impact or "zone of danger" related to his emotional injury, the District Court was correct in finding for Arco in the unseaworthiness claim.

Petitioner himself admits:

> This Court has not decided what marks the boundaries of a seaman's fitness except in the *Boudoin* assault context. The lower courts have generally required the use of a deadly weapon such as a knife e.g. *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989) or the use of something else in a

> savage manner, e.g., *Wiradihardja v. Bermuda Star Line*, 802 F.Supp. 989 (S.D.N.Y. 1992) (a bottle of catsup). Mere drunken assaults are not enough, e.g., *McKinley v. Afrom Lines (USA) Co., Ltd.*, 834 F.Supp. 510 (1993) . . .
>
> In *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967), this Court said that an "incompetent" seaman would render the vessel unseaworthy, but the facts of that case dealt with an inadequate number of seamen rather than an incompetent one. (Petition pp. 16, 17).

In *Boudoin v. Lykes Bros. S.S. Co., Inc.*, 348 U.S. 336 (1955) to which Petitioner refers, plaintiff oiler was injured by a maintenance man Gonzoles who, during the course of a night's drinking party, went to plaintiff's room and took a bottle of brandy from under plaintiff's bed and attacked plaintiff. The District Court found that Gonzales was "a person of dangerous propensities, and proclivities" "a person of violent character, belligerent disposition, excessive drinking habits disposed to fighting and making threats and assaults" and held that the shipowner breached its warranty of seaworthiness. The Court of Appeals reversed. The Supreme Court granted certiorari to resolve a seeming conflict between that opinion (Fifth Circuit) and *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2nd Cir. 1952), decided by the Second Circuit. In *Keen*, it was held that a crewman who tried to murder one of his fellows with a meat cleaver was not equal in disposition to those of his calling. The Supreme Court reinstated the district court's judgment in *Boudoin*.

In any event, it does not appear that any Court has carried the doctrine so far as to find a ship unseaworthy

because the Captain had an alleged sullen personality, absent some kind of vicious physical assault.

The procedural posture of the present case also counsels against granting the Petition for Certiorari. The present matter is still ongoing, remanded to the district court for a trial on the maintenance and cure issue.

Once again, Petitioner fails to spell out the compelling reason why this Court should call this non-final case to itself under Rule 10. There is no split of authority among the Circuit Courts of Appeal on whether a "zone of danger" test will also govern unseaworthiness claims based on emotional distress. Rather, the only Circuits that have considered the issue have so required: namely, the Sixth Circuit in *Szymanski v. Columbia Trans. Co.*, 154 F.3d 591 (6th Cir. 1998) and the Third Circuit in the present matter for the reasons ably expressed in the Opinions of the Courts below. Likewise, Petitioner has failed to spell out any departure from a decision of this Court on the unseaworthiness issue. Granting the Petition would encourage piecemeal litigation; likewise, the significant difficulties attendant to the present Complaint that referred to a specific incident on April 14, 1995 which Petitioner later identified but then disavowed and the beyond-the-statute-of-limitation references to emotional distress incidents about pasta and shrimp in 1994 and the Petitioner's failure to move to amend his Complaint to add these references counsel against granting Certiorari.

CONCLUSION

For all the above reasons, it is respectfully submitted that there is no compelling Reason under Rule 10 to grant the present Petition from an Interlocutory Order. The Petition should be denied.

Respectfully submitted,

DANTE MATTIONI, ESQUIRE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH C. PERNA	:	CIVIL ACTION
Vs.	:	NO. 97CV-4326
ARCO MARINE, INC.	:	

COMPLAINT
(WAIVER OF FILING FEE 28 U.S.C. SECTION 1916)
FIRST CAUSE OF ACTION
JURY TRIAL DEMANDED
(Filed Jun. 30, 1997)

Plaintiff hereby claims of the defendant a sum in excess of One Hundred Thousand Dollars ($100,000.00) in damages upon the following causes of action:

1. Plaintiff is a seamen.

2. This action is brought pursuant to the Maritime Law of the United States as modified by the Jones Act, 46 U.S.C. § 688 et. seq.

3. At all times material hereto, defendant, was doing business in Philadelphia, Pennsylvania.

4. At all times material hereto, plaintiff was in the employ of the defendant as a member of the crew of defendant's vessel "ARCO ALASKA" at the rate of pay and for the terms as get forth in his contract of employment.

5. On or about April 14, 1995 plaintiff suffered injuries while under the employment of defendant.

6. Plaintiff's injuries were caused by the negligence of the defendant, by its agents, servants, workmen and employees, by the unseaworthiness of the ARCO ALASKA, and by the defendant's breach if its obligations under the circumstances.

7. Solely by reason of the negligence of the defendant and the unseaworthiness of its vessel, plaintiff sustained personal injuries.

WHEREFORE, Plaintiff demands judgment against the defendant in excess of the sum of One Hundred Thousand Dollars ($100,000.00), with costs and interest, and brings this action to recover same.

SECOND CAUSE OF ACTION

IN ADMIRALTY

Plaintiff claims of defendant maintenance and cure and wages in such amount as may be determined by the Court upon the following cause of action:

8. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 7 inclusive of this Complaint, with the same force and effect as if fully set forth and repeated herein.

9. Plaintiff, by virtue of his services upon the said drillboat, claims maintenance and cure and wages for the period of this disability in an amount which to your Honorable Court shall deem just and proper upon the trial of this cause.

10. All and singular, the premises contained herein are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, plaintiff prays that judgment be entered against the defendant for such maintenance and cure and wages as the Court may determine to be due and owing upon the trial of this cause, and for such interest, costs and counsel fees as the Court may deem just and proper.

E. ALFRED SMITH & ASSOCIATES

By: /s/ E. Alfred Smith
ALFRED Smith
1333 Race Street
Second Floor
Philadelphia, PA 19107
ATTORNEY FOR PLAINTIFF